Supreme Court, U.S.
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No. 95-281

In the
Supreme Court of the United States
October Term, 1995

Richard Anderson; Robert Eggan; Carl Englehorn; Norris Nielsen; Timothy Wandersee; Donald Woods; Peter Lowry,

Cross-Petitioners,

vs.

Unisys Corporation, doing business as Remington Rand Univac, doing business as Sperry Univac, doing business as Sperry, doing business as Unisys, doing business as Paramax Systems,

Cross-Respondent.

ON CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether Cross-Petitioners Eggan, Englehorn, Lowry, Wandersee and Woods ("Cross-Petitioners") may revive extinguished claims against Cross-Respondent Unisys Corp. ("Unisys"), after making an affirmative decision, while advised and represented by counsel, not to proceed with a suit against Unisys?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties to the proceeding below are those listed in the caption on the cover of this petition.

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No. 95-281

SUPREME COURT OF THE UNITED STATES

Richard Anderson; Robert Eggan; Carl Englehorn; Norris Nielsen; Timothy Wandersee; Donald Woods; Peter Lowry,

Cross-Petitioners.

v.

Unisys Corporation, doing business as Remington Rand Univac, doing business as Sperry Univac, doing business as Sperry, doing business as Unisys, doing business as Paramax Systems,

Cross-Respondent.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Opinion of the United States District Court for the District of Minnesota granting Unisys' motion to dismiss was issued on October 20, 1993. It is unreported and reprinted in the Appendix to Unisys's Petition for Certiorari ("A") at A-47-60. The District Court's Opinion granting Unisys' motion for reconsideration was issued on December 28, 1993. It is unreported and reprinted at A-23-46.

Cross-Petitioners appealed to the Eighth Circuit Court of Appeals. A panel of the Court of Appeals issued a decision affirming the District Court's October 20, 1993 Order, but reversing the December 28, 1993 Order. The decision was issued on February 14, 1995, is reported at 47 F.3d 302 and reprinted at A-5-22. On April 19, 1995, the panel denied Cross-Petitioners' motion for rehearing. The April 19, 1995 Order is unreported and reprinted at A-1-4.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Eighth Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1), which provides for review "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." Under 28 U.S.C. § 2101(c), the writ must be "taken or applied for within ninety days after the entry of the judgment or decree." *See* Sup. Ct. R. 13.1. The 90 day period commences from the date of a denial of a petition for rehearing. In this case, Cross-Petitioners' petition for rehearing was denied on April 19, 1995. The 90 day period

would have expired on July 19, 1995. Unisys' Petition for Certiorari was filed on July 18, 1995. The thirty day period would have expired on August 18, 1995. Cross-Petitioners' cross petition was filed on August 18, 1995.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 626(d):

No civil action may be commenced by an individual under this section until 60 days after a charge of discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed--

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

29 U.S.C. § 633(b):

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant and seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, that such sixty day period shall be extended to one hundred and twenty days during the first year after the

effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

STATEMENT OF THE CASE

Cross-Petitioners made an affirmative decision, while advised by counsel, not to proceed with an action against Unisys. Cross-Petitioners were informed by counsel of the date that their claims against Unisys would expire, and elected not to bring an action because they believed it would be too expensive to proceed. The Eighth Circuit Court of Appeals recognized that fact, and therefore held that Cross-Petitioners could not later revive their extinguished claims based on the "single filing rule" articulated by this Court in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974). The Eighth Circuit Court of Appeals' decision is quite consistent with both the long line of cases establishing that an affirmative decision, while advised by counsel, not to proceed with a lawsuit forecloses a claimant from reviving his or her claims at a later date and with the purposes of the single filing rule, by allowing all other claimants to rely upon the single timely filing. No split of the Circuits exists on this issue; Cross-Petitioners do not suggest a single case in which any Court held that such individuals may revive claims after they decided, while advised by counsel, to allow those claims to expire. This Court should reject this cross-petition.

I. BACKGROUND

The background facts relevant to this cross-petition are described in pages 6-8 of Unisys' Petition for Certiorari. As is set forth in detail therein, this case arises from two sets of layoffs at Unisys' facility in Eagan, Minnesota in 1990. On April 2, 1990, Cross-Petitioners Anderson, Eggan, Englehorn, Lowry, Nielsen and Wandersee were informed that they were to be laid off. A second layoff occurred approximately two and one-half months later. On June 18, 1990, Cross-Petitioner Woods was informed that he would be laid off.[1]

Cross-Petitioners Eggan, Englehorn, Lowry, Woods and Wandersee all sought legal advice after their layoffs. Before they filed charges with the MDHR and the EEOC, they engaged Maurice O'Brien, a plaintiff-side employment law specialist at Gordon, Miller & O'Brien. Attorney O'Brien advised Cross-Petitioners in the charge-filing process.

More than 300 days passed before any Cross-Petitioner filed a charge of discrimination. Cross-Petitioners Eggan, Englehorn, Lowry, and Wandersee filed charges, by and through legal counsel, on April 1, 1991, one year after receiving notice of their layoff. Cross-Petitioner Woods

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[1] Numerous other layoffs have occurred in Unisys's software engineering department, most recently in 1994. Since 1986, Unisys' work force had been reduced from 125,000 to 60,000 through attrition, reductions and freezes on hiring.

separately filed a charge, by and through legal counsel, on June 4, 1991, well over 300 days after he was notified of his layoff.

Ruling separately in each case on requests to reconsider, the MDHR affirmed or reaffirmed its finding[2] that there was no probable cause to support the claims. Cross-Petitioners Eggan, Englehorn, Lowry, Woods and their counsel were notified in separate letters dated December 24, 1991 that no further action would be taken on the claims and that they had 45 days to begin litigation in accordance with Minnesota statutes. Plaintiff-Appellant Wandersee and his counsel received a similar notification on December 27, 1991.

Cross-Petitioners then met with Attorney O'Brien to discuss their options. Attorney O'Brien informed them that they could file a lawsuit in court, and explained that they had a forty-five day time limit for filing. Attorney O'Brien was willing to proceed to state or federal court, but Cross-Petitioners elected not to do so because they believed such an action would be too expensive.

On February 10, 1992, Plaintiff-Appellant Anderson filed, but did not serve, a complaint in Federal Court alleging

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[2] Cross-Petitioners' claims that Unisys misled the MDHR (which were rejected by the District Court and not addressed by the Eighth Circuit) are false: Unisys did not submit any statistical analyses or expert report to the MDHR, which conducted its own statistical analysis of the layoff and concluded that the evidence did not support a finding of probable cause of age discrimination.

state and federal discrimination claims. No claims on behalf of other employees were asserted in that complaint, which was not designated as a "class" complaint. On June 9, 1992 -- 119 days after this filing -- an amended complaint was served in which Plaintiff-Appellant Anderson first purported to represent a class of similarly situated employees. On March 25, 1993, the Court denied Plaintiff-Appellant Anderson's motion for class certification, but allowed members of the putative class to join the action. A-25. Six such "putative plaintiffs" elected to do so.

II. DISTRICT COURT'S DECISIONS

On October 20, 1993, the District Court held that the claims of Cross-Petitioners were untimely. The Court first held that Cross-Petitioners "received [ADEA] right to sue letters and deliberately decided not to file lawsuits after receiving legal advice." A-56. The Court explained that it could "only conclude that [Cross-Petitioners] made a deliberate and counseled decision not to proceed and to allow the statute of limitations to run." A-57. As a result, it dismissed their claims.

III. COURT OF APPEALS' OPINION

The Eighth Circuit Court of Appeals affirmed the District Court's October 20, 1993 Order dismissing Cross-Petitioners' claims against Unisys. The Court of Appeals upheld the District Court's conclusion that Cross-Petitioners' affirmative decision, while advised by counsel, not to proceed with an action against Unisys precluded them from later reviving their claims:

> The district court reasoned that those plaintiffs who had received their right-to-sue letters and thereafter deliberately decided not to file suit within the statute of limitations should be dismissed, but that Nielsen could continue to pursue his ADEA claim. We agree with the district court that the failure of those plaintiffs to file suit within ninety days after the receipt of their right-to-sue letters precludes them from joining Anderson's suit. They were given an opportunity to bring suit upon the issuance of the right-to-sue letter and failed to timely do so.

A-17-18. The Court of Appeals rejected Cross-Petitioners' argument that this decision was contrary to the single-filing rule set forth in *American Pipe*:

> Appellants' reliance on the American Pipe rule is misplaced. In American Pipe, the Court stressed the rule was "in no way inconsistent with the functional operation of a statute of limitations" because "[w]ithin the period set forth by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and the size of the projected litigation . . " Id. at 554-55. Here, the statute of limitations had run on the claims of all of the parties who had received right-to-sue letters, with the exception of Anderson, before Anderson ever purported to file on behalf of a class of similarly situated employees in June of 1992.

> Unisys therefore did not know it was facing multiple litigants in a representative suit until after both the state and federal statute of limitations had run. The American Pipe rule does not operate to revive stale claims, but rather tolls the limitations period on viable claims while the trial court determines the parameters of the class in any possible class action. Thus, the district court did not err in failing to apply the American Pipe rule.

A-18-19 (ellipses and parentheses in original).

The Court concluded that claimants such as the Cross-Petitioners may not rely upon the single-filing rule:

> Those plaintiffs who do file administrative charges, however, should be bound by the statute of limitations, which is normally stated in the right-to-sue letter. Even if those plaintiffs are piggybacking on another employee's timely administrative charge, once they file separate administrative charges, they cannot rely any further on the other claimant's actions and must timely file suit after receiving their right-to-sue letters. Thus, any claimant who files an administrative charge and receives a right-to-sue letter from the EEOC must file suit within ninety days after receiving that letter to preserve the cause of action.

A-20.

REASONS FOR REFUSING THE WRIT

I. CROSS-PETITIONERS' DECISION NOT TO PROCEED WITH AN ACTION PRECLUDES RELIANCE ON TOLLING

Cross-Petitioners seek to avoid the fact that they made a conscious decision, while represented and advised by counsel, not to proceed with this lawsuit. This affirmative decision not to proceed, while advised by counsel, precludes Cross-Petitioners from relying upon *American Pipe* or the single-filing rule and itself justifies dismissal of their claims.

Cross-Petitioners were represented over a period of eight to ten months by an employment law specialist, who explicitly advised them concerning the charge-filing process and age discrimination statutes, and who indicated to Cross-Petitioners that if they proceeded with a lawsuit, he would represent them. Mr. O'Brien briefed Cross-Petitioners on the issues involved in their claims and actually represented them at the EEOC and the MDHR. Moreover, after the Cross-Petitioners received their final determinations of no probable cause, he met with them, and advised them of their rights, offered to represent them and explained that, if they did not file within timelines, their claims would be time-barred.

Despite Mr. O'Brien's advice and offer of representation, Cross-Petitioners elected not to file an action against Unisys. This decision was based on the cost involved in such a lawsuit. As a result, they informed O'Brien that they did not wish to proceed. O'Brien gave them the name of at least one other plaintiff-side employment attorney, and advised them to consult other attorneys to attempt to obtain

a fee structure which would allow them to pursue the suit. He urged them to do so quickly, and warned them that they had forty-five days within which to file a claim. Cross-Petitioners decided as a group not to do so. Richard Anderson decided to proceed alone, pro se, and did so.

The Eighth Circuit Court of Appeals correctly observed that Cross-Petitioners' consultations with O'Brien are sufficient to preclude them from equitably tolling the ADEA's statute of limitations. A variety of Circuits have addressed similar situations, and have held that such consultations preclude reliance on equitable tolling principles. *Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 753 (1st Cir. 1988) ("constructive knowledge . . . is "attributed" to an employee in situations when he has retained an attorney"); *Morse v. Daily Press, Inc.*, 826 F.2d 1351 (4th Cir. 1987), *cert. denied*, 484 U.S. 965 (1987) ("retaining an attorney extinguishes the equitable reasons for tolling the 180 day period"); *DeBrunner v. Midway Equip. Co.*, 803 F.2d 950 (8th Cir. 1986) (plaintiff "concedes that prior to her discharge [she] was aware of her right to bring suit under the ADEA, having already consulted with an EEOC attorney. [Defendant] met its burden of proving [she] knew generally of her rights"); *Cano v. U.S. Postal Serv.*, 755 F.2d 221, 222 (1st Cir. 1985) (plaintiff "consulted with an attorney about her employment difficulties just prior to the beginning of the limitations period and subsequently, she could be charged with constructive knowledge of the relevant Title VII provisions and the procedural requirements of filing an EEOC complaint"); *Edwards v. Kaiser Aluminum & Chem. Sales, Inc.*, 515 F.2d 1195, 1200 (5th Cir. 1975) (consultation with attorney precludes tolling). *See United States v. Kubrick*, 444 U.S. 111, 123 (1979) ("A plaintiff . . . armed with the facts

about the harm done to him, can protect himself by seeking advice in the medical and legal community"). Cross-Petitioners' informed and counseled decision not to proceed, and their failure to file or serve a timely Complaint, precludes them from circumventing the ADEA's statute of limitations.[3]

The Eighth Circuit Court of Appeals' decision reconciled this line of decisions, and the rule against allowing a party who made a counseled decision not to proceed with an action to toll the statute of limitations, with the single-filing rule of *American Pipe*. Cross-Petitioners do not cite a single case in which the single-filing rule was applied to permit individuals who had consulted with an attorney, and who had elected not to file a lawsuit, to then piggy-back their untimely claims on those of a timely plaintiff.[4] As discussed

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[3] Cross-Petitioners' observation that a claimant may be worse off if he or she files a charge and then chooses not to pursue a claim than if he or she had not filed a charge at all is understandable under these circumstances. Traditional statute of limitations analysis provides that a party that is ignorant of a claim may be entitled to toll the statute while a party that does some investigation, discovers the claim, and chooses not to go forward, is not entitled to tolling. That is exactly the rule articulated by the Eighth Circuit in this case. Cross-Petitioners' suggestion that the "more deserving" claimants are penalized is thus precisely backwards: those parties who realized that they had a claim, but decided not to pursue it, are thereafter precluded from reviving that claim.

[4] In fact, not only is there no "split" in the Courts on the issue, but at least one other court has relied on similar

above, consultations with an attorney extinguish a plaintiff's ability to toll the statute of limitations. The single-filing rule is yet another mechanism by which the statute of limitations may be tolled. *American Pipe*, 414 U.S. at 555 ("the tolling rule we establish here"). The Cross-Petitioners cannot suggest any reason why this tolling is not also extinguished.

In fact, the purpose behind the single-filing rule does not support the Cross-Petitioners' claims. The single-filing rule was adopted because without it:

> Potential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable . . . .a rule requiring successful anticipation of the determination of the viability of the class would breed needless duplication of motions.

American Pipe, 414 U.S. at 553-554. In this case, Cross-Petitioners had already decided not to file an action when Anderson filed his Complaint. There was no threat of duplication, or of motions to intervene: Cross-Petitioners had already decided that they did not wish to participate in such a lawsuit. They were not waiting to see whether Anderson was successful, nor did they consider that he filed on their

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reasoning as that set forth by the Eighth Circuit in this case. *Manildra Milling Corp. v. Ogilvie Mills, Inc.*, 746 F. Supp. 40, 42 (D. Kan. 1990) (relation back doctrine inappropriate against a new defendant because plaintiff made a "conscious decision" to leave defendant out of the original complaint).

behalf. He was going it alone. Cross-Petitioners' argument, if accepted, would make a shambles of all timelines and policies underlying "closure" in statutes of limitations.

The Eighth Circuit's decision is also consistent with the economy and efficiency objectives of the *American Pipe* single filing rule. The Court of Appeals' holding applies only to those claimants that file a charge of discrimination, retain counsel, and subsequently make an affirmative decision not to proceed with a lawsuit. This rule establishes a bright-line test that is easy to administer and efficient in operation.

Cross-Petitioners respond that this rule would "compel attorneys to . . . recruit every claimant who filed an administrative charge" resulting in the inclusion of "weak claims" that "could afterwards impair a clear focus on the evidence that established the more meritorious claims." This argument is nonsensical: the attorneys could easily interview the potential claimants at the time of recruitment to determine if they possessed an appropriate claim. Moreover, every class action contains stronger and weaker claims, and the rule set forth by the Eighth Circuit will not change that fact. If anything, this rule would exclude precisely those claimants that should be excluded: those whose claims were dismissed by the administrative agency and who decided that their claims were not worth pursuing in court.[5]

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[5] Cross-Petitioners also mention the issue of whether the statute of limitations contained in the 1991 Civil Rights Act Amendments may be applied retroactively. The Eighth Circuit Court of Appeals held that this issue was not properly raised below and may not be raised on appeal, a conclusion

Cross-Petitioners made an affirmative decision, while advised by counsel, not to proceed with an action against Unisys. They elected to allow the statute of limitations to expire on their claims. They should not be permitted to revive those claims at this late date.

CONCLUSION

For all of these reasons, Unisys respectfully requests that this Court deny the cross-petition for a writ of certiorari.

Respectfully submitted this 20th day of September, 1995.

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that Cross-Petitioners do not challenge here. See A-17, n. 14.